Supreme Court, U.S.
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92-903

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

POSTERS 'N' THINGS, LTD., and
LANA CHRISTINE ACTY,
PETITIONERS

VS.

UNITED STATES OF AMERICA,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents the following questions for review:

1. Whether the Mail Order Drug Paraphernalia Control Act, 21 U.S.C. §857, has been applied unconstitutionally in violation of due process requirements of the Constitution.

2. Whether the Mail Order Drug Paraphernalia Control Act 21 U.S.C. §857, has a subjective scienter competent which would require, as a condition precedent for conviction, proof that a retailer intended that the items be used for drugs.

3. Whether 21 U.S.C. §841(a)(1), can be applied to substances deemed objectively as a per se violation of 21 U.S.C. §857, and, when deemed objectively illegal, whether these definitions can be used as a basis for a violation under 21 U.S.C. §841(a)(1).

4. Whether proof was adequate below for a jury to find guilt under 21 U.S.C. §841(a)(1).

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is contained in Appendix A.

The opinion of the United States District Court for the Southern District of Iowa is contained in Appendix B.

JURISDICTION

The Court of Appeals for the Eighth Circuit ("Eighth Circuit") filed its judgment on July 13, 1992. On August 17, 1992, the Eighth Circuit denied a Petition for Rehearing and Suggestion for Rehearing En Banc. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). Certiorari review is appropriate because the case involves important questions of federal law which have not been, but should be, settled by this Court. Further, the decision of the Eighth Circuit Court of Appeals in this case directly conflicts

with decisions of the Second, Sixth and Tenth Circuits, as well as a multitude of Federal Courts below.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Mail Order Drug Paraphernalia Control Act. 21 U.S.C. §857 ("Section 857"), is set forth in Appendix C.

2. 21 U.S.C. §841(a)(1) ("Section 841") is set forth in Appendix D.

3. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The Jurisdiction of the District Court of the Southern District of Iowa was based on 18 U.S.C. § 3231. The jurisdiction of the Eighth Circuit Court of Appeals was based on 28 U.S.C. § 1291.

Appellant Acty was charged with two counts of using an interstate conveyance to transport drug paraphernalia, in violation of 21 U.S.C. § 857(a)(1); two counts of conspiring to use interstate conveyance to sell drug paraphernalia, in violation of 18 U.S.C. § 371 and 21 U.S.C. § 857(a)(1); aiding and abetting the manufacture and distribution of cocaine, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; Investment of illicit drug profits in violation of 21 U.S.C. § 854; laundering of monetary instruments, in violation of 28 U.S.C. § 1956(a)(1)(A); and two counts of engaging in monetary transactions with

proceeds of unlawful activity, in violation of 18 U.S.C. § 1957 and 18 U.S.C. § 2.

Appellant Posters 'N' Things ("Posters") was charged with two counts of using interstate conveyance for the sale of drug paraphernalia in violation of 21 U.S.C. 857(a)(1); and one count of conspiring to use interstate conveyance for the sale of drug paraphernalia in violation of 18 U.S.C. 371.

On the 28th of December, 1990, both Appellants were found guilty on all counts following a jury trial. On June 11, 1991, the District Court sentenced Appellant Acty to 108 months in prison on each count of conviction, to be served concurrently. Appellant began serving that sentence on October 7, 1992. Appellant Posters was fined $75,000 on each count, concurrently, with a special assessment of $600, for a total amount due of $75,600.

Appellants Acty and Posters filed an appeal with the Eighth Circuit Court of Appeals on December 9, 1991, challenging the constitutionality of the drug paraphernalia charges and the sufficiency of the evidence on the money laundering counts. On July 13, 1992, a three-judge panel of the Eighth Circuit denied the Appellants' appeal. On August 17, The Eighth Circuit denied the Appellants' application for rehearing and rehearing en banc.

Facts Relevant to Review

In March of 1990, law enforcement officer executed search warrants for the home of Appellant Acty and her husband, George Michael Moore, and for three businesses operated by Poster's N' Things, Ltd., a business formed by Appellant Acty

in 1977. The businesses were a diet aid store, an art gallery, and "World Wide Imports", a merchandise store.

United States Government Customs agents along with special agents for the Internal Revenue Service seized from the store a number of inventory items alleged to constitute drug paraphernalia as defined by the Mail Order Drug Paraphernalia Control Act ("Drug Paraphernalia Act") in violation of 21 U.S.C. §857. Under the search warrant, the officials were to seize items, including, but not limited to, all materials of any kind which were primarily intended for use in manufacturing, compounding, processing, or preparing a controlled substance including "cuts" and specifically cited mannitol, procaine, and inositol as drug paraphernalia. All the

items that were eventually seized were in their original packaging; none had yet been used.

None of the seized items are primarily intended for use with illegal drugs. While the warrant sought items primarily intended for use with controlled substances, once these items were introduced at trial, the jury was not allowed to determine on their own, whether or not the items were illegal paraphernalia. Instead, the District Court adopted an objective definition of paraphernalia. The jury was instructed, under Jury Instructions number 37 and 39,(Appendix "E" and "F" hereto, infra) that the items of evidence including, but not limited to, those listed, under 21 U.S.C. §857(d)(1)-(15), were **per se** drug paraphernalia. Under this objective approach, the intent on the part of the Petitioners was deemed not relevant to

their guilt or innocence under the Drug Paraphernalia Act. The items offered into evidence included mannitol, mannite, and inositol, whose sale as a drug paraphernalia the government alleged was violative of 21 U.S.C. §841(a)(1). The government's own witnesses, United States Customs officer John Stecker and prosecution witness William Hopkins testified that drug paraphernalia was to be determined on a subjective basis with the guilt of the Petitioners to be determined in light of their intent. The government's witnesses stated that the substances mannitol, mannite, or inositol were drug paraphernalia.

This case presents two important issues. The first is whether the Drug Paraphernalia Act may be constitutionally applied on an objective

basis, as it was in this case. Such an construction would reject a retailer's intent in determining guilt or innocence. The Courts of Appeals are split on this issue. The United States Customs and Internal Revenue Service agents in this case seized items which they alleged to be primarily intended for use with illegal drugs. Under the terms of §857(d), the statute may only be applied to items "primarily intended or designed" for use with controlled substances. To avoid unconstitutional vagueness, the statute must require an intent on the part of the Petitioners to distribute the items for drug use. Section 857 must, thereby, contain a subjective scienter requirement as applied to the retail Petitioners. Since the Court instructed the jury that the Drug Paraphernalia Act was objective in nature including such items as mannitol,

mannite, and inositol, the Act has been applied unconstitutionally in this case in violation of the standards announced by this Court in Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) ("Hoffman Estates").

The second issue is whether the mannitol, mannite, inositol, "cuts", or "adulterants," alleged to be drug paraphernalia, were properly presented to the jury for their determination as to whether or not they were paraphernalia. In finding the Petitioners guilty of 21 U.S.C. §841(a)(1), the jury heard the government's witnesses testify and they were subsequently instructed by the Court, that the alleged "cuts" or "adulterants" were per se illegal on an objective basis in violation of 21 U.S.C. §857. This sale of substances deemed objectively to be drug

paraphernalia satisfied the jury's question of the intent, on the part of the Petitioners, to assist in the manufacturing of a controlled substance in violation of 21 U.S.C. §841(a)(1). The District Court's error, in Jury Instruction number 37 which compelled the jury to find mannitol, mannite, or inositol, to be drug paraphernalia **per se**, violated the jury's ability to determine the Petitioners' intent, under 21 U.S.C. §841(a)(1), in violation of the Petitioners' right to Due Process.

REASONS FOR GRANTING THE WRIT

I. THE JUDGMENT OF THE EIGHTH CIRCUIT DIRECTLY CONFLICTS WITH THE PRIOR JUDGMENT OF THIS COURT IN VILLAGE OF HOFFMAN ESTATES V. FLIPSIDE, HOFFMAN ESTATES, INC., 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982).

In VILLAGE OF HOFFMAN ESTATES V. FLIPSIDE, HOFFMAN ESTATES, INC., 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) the Supreme Court upheld the constitutionality of a drug paraphernalia ordinance which applied to items "designed or marketed for use" with controlled substances. Id., 455 U.S. at 500, 102 S.Ct. at 1194. In doing so, the court specifically stated that proof of scienter on the part of the defendant was a requirement in order to prevent the statute from being considered void for vagueness. Id., footnote 17. The Eighth Circuit in this case, however, specifically held that proof of a subjective scienter on the part of the defendant was not required.

The ordinance at issue in Hoffman Estates required a business to obtain a license prior to selling any items "designed or marketed for use with illegal

cannabis or drugs." Id., 455 U.S. at 491, 102 S.Ct. at 1189. The Plaintiff in that case raised a pre-enforcement challenge to the facial constitutionality of the ordinance. Id.

Justice Marshall, writing for the majority of the Court, rejected the facial challenge, specifically citing the scienter requirement contained in the phrase "marketed for use." Id., 455 U.S. 499-500, 102 S.Ct. 1194. The Court noted that while the District Court "apparently relied on the growing vernacular understanding of "paraphernalia" as drug-related items . . . a regulation of "paraphernalia" alone would not provide much warning of the nature of the items regulated." Id.

The Court further determined that the phrase "designed for use" was not unconstitutionally vague on its face since the Plaintiff in the action conceded that

the phrase specifically referred to "structural characteristics of an item." Id., 455 U.S. at 501, 102 S.Ct. at 1195.

Despite this clear statement of the law concerning the constitutionality and scienter requirements for regulations of "paraphernalia", that interpretation was directly contradicted in this case with the Eighth Circuit's interpretation, which applied an objective standard and found all inventory of the Petitioner/retailer to be per se drug paraphernalia. United States v. Posters 'N' Things, Nos. 91-2429, 91-2426, 91-2432, p. 6 (8th Cir. 1992). Justice Marshall's majority opinion stated "[a] business person of ordinary intelligence would understand that this term refers to the design of the manufacturer, not the intent of the retailer or customer." Hoffman Estates, 455 U.S. at 501, 102 S.Ct. at 1195. (emphasis added). What the

District Court and the Eighth Circuit have done in this case is to transfer the manufacturer's intent in design to the Petitioners/retailer intent in marketing, and thereby removing the requirement that the government prove scienter on the part of the retailer.

While the Hoffman Court illustrated how an objective scienter could be applied against a designer/manufacturer whose own intent was made clear by the physical characteristics of an item, the Court asserted that the balance of the definition, in the Hoffman ordinance, called for a subjective review of the retailer's intent under the term "marketed for use." "The standard requires scienter, since a retailer could scarcely 'market' items 'for' a particular use without intending that use." Id., 455 U.S. at 502, 102 S.Ct. at 1195.

The Petitioners in this case were accused of violating 21 U.S.C. §857 which provides in part:

> (d) Definition of "drug paraphernalia"
>
> The term "drug paraphernalia" means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of the Controlled Substances Act (title II of Public Law 91-513). It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, or amphetamines into the human body,

The statute then goes on to list examples of specific items such as pipes, miniature spoons and bongs which might fit the definition of paraphernalia.

The Eighth Circuit erred in applying an objective designer's intent to the retail Petitioners. The Eighth Circuit compounded its error by completely ignoring the subjective intent on the part of the Petitioner/retailer as required by the phrase "primarily intended." In fact, the Eighth Circuit, in its zeal to uphold the District Court's imposition of an objective standard against the Petitioners/retailer, completely ignored the phrase "primarily intended" as though it did not exist in the law. This error on the part of the Eighth Circuit, violated the Petitioners' Due Process rights as provided by the Fifth Amendment to the United States Constitution.

The objective scienter requirement applied against the Petitioners further manifests itself in the accusation of

aiding and abetting in the violation of 21 U.S.C. §841(a)(1)
(manufacture and distribution of cocaine). The government's witnesses testified that mannitol, mannite, and inositol were "objectively" drug paraphernalia and, thereby in violation of 21 U.S.C. §857. Under 21 U.S.C. §857, the mannitol, mannite, and inositol, were "objectively" viewed in light of the definition of drug paraphernalia which includes items for use in manufacturing, compounding, processing, or preparing a controlled substance. By its own definition, the mannitol, mannite, and inositol defined and "objectively" charged to the jury, under §857, required the jury to find that the substance were intended for manufacturing with a controlled substance. The jury was thus forced to find that the Petitioners

aided and abetted in the manufacture of cocaine under 21 U.S.C. §841(a)(1).

In Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), the Supreme Court restated the clear constitutional dictate that a jury charge may not create "a presumption that relieves the State of its burden of persuasion on an element of an offense." Id., 471 U.S. at 315, 105 S.Ct. at 1971. See also Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

By using an objective standard, and thus creating per se paraphernalia, the District Court shifted the burden of proof onto the retailers, forcing them to attempt to prove that affected items are not intended for use in connection with controlled substances. Such a shift is a clear violation of the Due Process Clause

of the Fifth Amendment to the United States Constitution.

II. THE QUESTIONS PRESENTED ARE OF SUBSTANTIAL IMPORTANCE, THE RESOLUTION OF WHICH WILL HAVE NATIONWIDE IMPACT.

The instant case involves a challenge to a federal paraphernalia statute, and its application, which is being used to seize inventory from innocent merchants all over the country. Because of the "objective" theory of prosecution as used by the Eighth Circuit in this case versus the "subjective" theory of prosecution as used by the Second, Sixth and Tenth Circuits, as discussed below, a merchant does not know either what he can sell or the manner in which it may be sold.

The Drug Paraphernalia Act, as applied by federal agents herein and as interpreted by the Eighth Circuit below, is

unconstitutionally vague in that it fails to provide fair notice of the person covered and the conduct prescribed. This is evident from the recent decisions among three of the Circuit Courts of Appeals concerning the Act. In the United States Court of Appeals for the Second Circuit in United States v. Schneiderman, 968 F.2d 1564 (2nd Cir. 1992), the Second Circuit ruled that the Drug Paraphernalia Act contained a scienter requirement and required proof of intent on the part of the accused. Id., at 1566, 1567. "To show a defendant "primarily intended" to sell drug paraphernalia, the government need not show that the items would necessarily be used in connection with illegal drugs, but it must prove that the defendant knew there was a strong probability the items would be so used." Id. at 1567. The Sixth Circuit, in

United States v. 57, 261 Items of Drug Paraphernalia, 869 F.2d 955 (6th Cir 1989) also upheld the constitutionality of the Act because they first determined that conviction under Section 857 required proof of the defendant's subjective intent to violate the law. Most recently, the Tenth Circuit Court of Appeals in United States v. Murphy, No. 92-4020 (10th Cir. Oct. 10, 1992) followed the Schneiderman ruling and held that the statute had to be considered subjective in nature.

In addition to ignoring the dictates of Hoffman Estates, the Eighth Circuit decision in this case runs counter to the other three Circuit Opinions. The District Court Opinion in this case relied on the opinion of United States v. Dyer, 750 F.Supp. 1278 (E.D. Va. 1990). The court in Dyer stated that, "In some situations a

violation may be established solely by reference to design features or objective circumstances, provided that the government shows the defendant's awareness of the general nature of the object," Id. at 1284.

The lack of a clear standard on the standard to be applied leaves legitimate businesses and individuals open to arbitrary, erratic, and discriminatory arrests, prosecutions, convictions, and property seizures. This is particularly true under the Eighth Circuit's interpretation of the Act. Under the Eighth Circuit's interpretation, the Drug Paraphernalia Act puts vast amounts of retail inventory items in serious jeopardy while completely ignoring the intent of the retailer and the manner in which the items are sold.

This Court has previously recognized the importance of issues presented by

statute and ordinances banning "drug paraphernalia" in its decision in Hoffman Estates. A resolution of the conflict between this Court's opinion in Hoffman Estates and the Eighth Circuit's opinion below which clashes with decisions from both the Tenth, Sixth and Second Circuits will have a substantial impact upon merchants in states across the nation.

III. THE DECISION OF THE EIGHTH CIRCUIT IS CLEARLY IN ERROR AND SHOULD BE REVERSED

Under § 857, drug paraphernalia is defined in part as any item which is primarily intended in to be used in the manufacturing or otherwise introducing a controlled substance into the human body. As defined by the district court and upheld by the Eighth Circuit and applied herein, that phrase is unconstitutionally vague. Neither the district court nor the Eighth

Circuit defined the term "primarily intended" nor sought or applied any meaning to the phrase.

Section 857 is based upon the Drug Enforcement Agency's Model Act as propounded by the Department of Justice in 1979. See United States v. Main Street Distributing, Inc., 700 F.Supp. 655 (E.D.N.Y. 1988). Since that time, numerous state and local governments enacted statutes outlawing the sale of drug paraphernalia. While this Court has never reviewed a case involving the Model Act or its progeny, the decision in Hoffman Estates addressed the issue of a retailer's intent in reviewing the term "marketed for use" "[I]t describes a retailer's intentional display and marketing of merchandise." Hoffman Estates, 455 U.S. at 502, 102 S.Ct. at 1195. The standard requires proof of a specific state of mind,

since a retailer could scarcely 'market' for a particular use without intending that use. Id. Under the less specific standard "intended for use," other circumstantial evidence may be considered by a finder of fact, such as the manner of retail display for specific items. Id.. Under Section 857, the term "intended for use," obviously important in the definition of drug paraphernalia, compels a finder of fact to search for the primary intent on the part of the accused retailer. That step was ignored in this case by both the District Court and the Eighth Circuit.

While this Court has not reviewed the defined term "intended for use" in relation to drug paraphernalia, the definition has been clearly established by numerous United States Courts of Appeals. In New England Accessories Trade Association v. City of Nashua, 679 F.2d 1 (1st Cir. 1982), the

Court held that the term referred to, and required proof of, scienter on the part of the charged defendant. Id., at 6.

In Casbah, Inc. v. Thone, 651 F.2d 551 (8th Cir. 1981), the Eighth Circuit was faced with an action by wholesale and retail distributors challenging the constitutionality of a Nebraska statute prohibiting the sale and manufacture of drug paraphernalia. The Court, in upholding the constitutionality of the statute, held that the phrase "intended for use" referred to the intent of the person charged with the violation. Id., at 559. A similar ruling was also made by the Fifth Circuit in Tobacco Accessories and Novelty Craftsmen Merchants Association of Louisiana v. Treen, 681 F.2d 378 (5th Cir. 1982). See also Record Revolution No. 6, Inc. v. City of Parma, 638 F.2d 916 (1981).

Each court cited above, as well as the Courts in Schneiderman, Murphy and 57,261 Items of Drug Paraphernalia, the cases specifically relating to the Act at issue in this case has found that the term "intended for use" referred to the subjective intent on the part of the retailer or distributor of alleged drug paraphernalia.

To be constitutional in its application, the term "intended for use" must allow the finder of fact to determine that the accused has intended or, in this case under section 857, that the defendant primarily intended the items which they sold to be used with controlled substances. In this case, however the district court rejected the clear majority of opinions and specifically informed the finder of fact, under Jury Instructions No. 37 and 39, that the items listed in the law were indeed

drug paraphernalia and that the intent on the part of the accused retailer was not relevant. Under this objective standard applied by the District Court in this case and upheld by the Eighth Circuit, the substances mannitol, mannite, and inositol, referred to as cuts and adulterants, were not determined by the jury to be paraphernalia, but were determined by the court to be paraphernalia in the Court's Jury Instructions Number 37 and 39.

These instructions advised the jury to view alleged drug paraphernalia objectively, to find that the items were illegal, and to disregard any intent on the part of the Petitioners/
retailer. This amounted to a clear order to the jury to direct a verdict against the Petitioners for a violation of 21 U.S.C. §841(a)(1). Inserting the court's standard for mannitol, mannite, and inositol in the

Drug Paraphernalia Act into a statute which required intent provides no notice to retailers as to what will or will not be considered illegal. This failure in interpretation violated the retail defendant's Fifth Amendment rights to Due Process of Law. As each count of Petitioners' conviction is directly based on the paraphernalia convictions, a reversal of all counts is therefore required.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the court grant this petition for a Writ of Certiorari.

APPENDIX

Appendix A. United States v. Posters 'N' Things, Ltd. and Lana Christine Acty, Nos. 91-2426, 91-2429, 91-2432 (8th Cir. 1992).

Appendix B. Order Denying Petition for Rehearing and Suggestion for Rehearing En banc, United States v. Posters 'N' Things, Ltd. and Lana Christine Acty, Nos. 91-2426, 91-2429, 91-2432 (8th Cir. 1992)

Appendix C. 21 U.S.C. §857, later recodified as 21 U.S.C. §863(d).

Appendix D. 21 U.S.C. §841(a).

Appendix E. Jury Instruction No. 37.

Appendix F. Jury Instruction No. 39.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT
No. 91-2426

United States of America,

Appellee,

v.

Posters 'N' Things Ltd, an Iowa Corporation d/b/a World Wide Imports; d/b/a Forbidden Fruit; d/b/a Acty-Moore Gallery,

Appellant.

No. 91-2429

United States of America,

Appellee,

v.

Lana Christine Acty, a/k/a Chris Acty,

Appellant.

Appeals from the United States District Court for the Southern District of Iowa

No. 91-2432

United States of America, *
*
Appellant, *
*
v. *
*
Lana Christine Acty, a/k/a Chris Acty, *
*
Appellee. *

Submitted: December 9, 1991

Filed: July 13, 1992

Before BEAM, Circuit Judge, HEANEY, Senior Circuit Judge, and LOKEN, Circuit Judge.

BEAM, Circuit Judge

Posters 'N' Things, Ltd. ("Posters") and Lana Christine Acty were convicted of a variety of offenses related to the sale of drug paraphernalia. Poster and acty appeal from their convictions, claiming that 21 U.S.C. §857, prohibiting the sale of drug paraphernalia in foreign or

interstate commerce, is unconstitutional. Acty also appeals on the ground that there is insufficient evidence to support her convictions for laundering monetary instruments and for aiding and abetting the manufacture and distribution of cocaine. The government cross-appeals claiming, among other points, that the district court, erred by failing to sentence Acty to the mandatory minimum years of imprisonment required by 21 U.S.C. §841(b). The government also claims that the district court erred by departing below the guideline-specified sentencing range. We affirm the district court in all respect.

I. DISCUSSION

Posters, which was formed by Acty in 1977, operated three businesses: a diet aid store, an art gallery, and "forbidden Fruit" (renamed "World Wide Imports"), a merchandise store. Posters and Acty came

under investigation after law enforcement officers received complaints that the merchandise store was selling drug paraphernalia and after officers working on other drug-related cases discovered drug paraphernalia and drug diluents purchased from Forbidden Fruit.

Following an investigation, law enforcement officers executed search warrants in March 1990 for the merchandise store, the art gallery, and the residence of Acty and her husband, George Michael Moore. As a result of these searches, officers confiscated, among other items, various business and financial records, drug paraphernalia (e.g., pipes, bongs, scales, roach clips, cocaine mirrors), cash, chemicals used to dilute cocaine (e.g., Mannitol, Inositol, and Lidocaine), and catalogs and other advertisements from Forbidden Fruit's suppliers and from

Forbidden Fruit itself. Posters and Acty (and Moore) were eventually indicated on a number of charges and doing jury trial was held in December 1990.[1]

Following the trial, the jury found Acty and Posters guilty of use of interstate conveyance to transport drug paraphernalia, in violation of 21 U.S.C. §857(a)(1) (two counts for each defendant. Acty alone was also found guilty of aiding and abetting the manufacture and distribution of cocaine, in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2; investment of income derived from a violation of 21 U.S.C. §841(a)(1), in violation of 21 U.S.C. §854; laundering of monetary instruments, in violation of 28 U.S.C. §1956(a)(1)(A); conspiring to

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[1]This appeal does not include Moore. He failed to appear for sentencing and, apparently, is still a fugitive.

launder monetary instruments, in violation of 18 U.S.C. §371 and 18 U.S.. §1956(a); and engaging in monetary transactions with proceeds of unlawful activity, in violation of 18 U.S.C. §1957 and 18 U.S.C. §2 (two counts).

At sentencing, the district court fined Posters $75,000 and sentenced Acty to 108 months in prison on each count of conviction to be served concurrently. In sentencing Acty, the district court departed from the guidelines by not grouping the offense level for the aiding and abetting count with the other counts, on the basis that Acty's case was "essentially a drug paraphernalia and money laundering case, not a case of aiding and abetting." Acty's Judgment at 5.

Posters, Acty, and the government appeal from the judgments of the district court. Posters and Acty claim that the

drug paraphernalia statute, 21 U.S.C. §857(a)(1), is unconstitutional for vagueness. Acty also claims that her convictions for aiding and abetting the distribution of cocaine and for laundering monetary instruments are not supported by sufficient evidence. The government claims that the district court erred by not sentencing Acty to the mandatory minimum sentence of ten years' imprisonment required 21 U.S.C. §841(b) for the aiding and abetting count, and by departing from the guideline-specified sentence on the aiding and abetting count.

II. DISCUSSION

A. Constitutionally of 21 U.S.C. (857.

Section 857 of Title 21 of the United States Code was enacted by Congress as part of the Anti-Drug Abuse Act of 1986. Section 857--which was repealed in 1990 and

recodified with a slightly broader scope at 21 U.S.C. §863--made it unlawful to sell drug paraphernalia in interstate of foreign commerce. Section 857 provided, in part:

> (a) Unlawfulness
>
> It is unlawful for any person--
> (1) to make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia;
> (2) to offer for sale and transportation in interstate or foreign commerce drug paraphernalia; or
> (3) to import or export drug paraphernalia.
>
> . . .
>
> (d) Definition of "drug paraphernalia"
>
> The term "drug paraphernalia" means any equipment product, or material of any kind which is primarily intended or designed for use of manufacturing, compounding, converting, concealing, producing, processing, preparing,

injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of the Controlled Substances Act (title II of Public Law 91-513). It includes items primarily intended or designed for use of ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, or amphetamines into the human body, such as--

(1) metal, wooden, acrylic, glass, stone plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(2) water pipes;

(3) carburetion tubes and devices;

(4) smoking and carburetion masks;

(5) roach clips: meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand;

(6) miniature spoons with level capacities of one-tenth cubic centimeter or less;

(7) chamber pipes

(8) carburetor pipes;

(9) electric pipes

(10) air-driven pipes;

(11) chillums;

(12) bongs;

(13) ice pipes or chillers;

(14) wired cigarette papers; or

(15) cocaine freebase kits.

(e) Matters considered in determination of what constitutes drug paraphernalia:

In determining whether an item constitutes drug paraphernalia, in addition to all other logically relevant factors, the following may be considered:

(1) instructions, oral or written, provided with the item concerning its use;

(2) descriptive materials accompanying

the item which explain or depict its use;

(3) national and local advertising concerning its use;

(4) the manner in which the item is displayed for sale;

(5) whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(6) direct or circumstantial evidence of the ratio of sales of the item(s) to the total sales of the business enterprise;

(7) the existence and scope of legitimate uses of the item in the community; and

(8) expert testimony concerning its use.

(f) Exemptions

This section shall not apply to--

(1) any person authorized by local, State, or Federal law to manufacture, posses, or distribute such items, or

(2) any items that , in the normal lawful course of business, is imported, exported, transported, or sold through the mail or by any other means, and traditionally intended for use with tobacco products, including any pipe, paper, or accessory.

21 U.S.C. §857.

1. **Scienter**

We begin our analysis of Posters and Acty's constitutional challenge to section 857 by considering their claim that section 857 violates the Due Process Clause of the Fifth Amendment because it does not contain an express, subjective scienter or knowledge requirement. According to Posters and Acty, the language of section

857 and its legislative history demonstrate that section 857 is a strict liability criminal statute, and, therefore, it is unconstitutionally because strict liability criminal statutes are only permitted for regulatory offenses or for offenses with small or monetary penalties. We disagree that section 857 violates due prccess and we hold that section 857 contains an objective scienter requirement.f

There are a number of federal court opinions on section 857 and its scienter requirement. These cases can be summarized in three categories. First, there are a group of decisions that hold a subjective-type scienter must be read into section 857. In other words, the government must prove at trial that a defendant (such as Acty) intended that the items she offered for sale would be used with controlled substances or that she herself designed the

items for use with controlled substances. See, e.g., United States v. Main Street Distributing, 700 F. Supp. 655, 666 (E.D.N.Y. 1988) (The government is "required to prove at trial that [a defendant] either designed the items listed in the indictment for use with controlled substances or intended them to be for drug use"); cf. United States v. 57,261 Items v Drug Paraphernalia, 869 F.2d 955, 957 (6th Cir.) ("The person to whom the statute is being applied . . . must have knowledge that there is a strong probability that the items will be used" for drug use), cert denied, 493 U.S. 933 (1989).[2]

Second, some courts have decided, as the district court did in Posters and

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[2]Although neither Posters and Acty nor the government argue in this case that section 857 contains a subjective scienter as interpreted by these cases, we must still consider the possibility in our analysis.

Acty's case, that section 857 contains an objective scienter requirement. In other words, that "[i]n some situations a violation may be established solely by reference to design features or objective circumstances, provided that the government shows the defendant's awareness of the general nature of the object." United States v. Dyer, 750 F. Supp. 1278, 1284 (E.D. Va. 1990). Under this position, a defendant, "of course, remains free to contest the government's proof with her or his own objective facts." Id.

Third, is a category of cases in which courts have held that the language of section 957 cannot be construed to contain a scienter requirement and, in fact, Congress did not intend a scienter requirement. These courts have held that section 857 is unconstitutional as a strict liability offense See e.g., United States

v. Schneiderman, 777 F. Supp. 258, 271 (S.D.N.Y. 1991); United States v. Murphy, 91-NCR-61G, Order of Dismissal (D. Utah Jan. 7, 1992) (brief, unpublished order stating, "[T]he Court finds that the provisions of 21 U.S.C. 863(a) (formally 21 U.S.C. 857) are unconstitutionally vague and that the statute does not provide a scienter or intent requirement as required by the Constitution").

The omission of subjective scienter language from a statute does not preclude a court from reading such a knowledge requirement into the statute. See Morissette v. United States, 342 U.S. 246, 250 (1952). And if we follow cases like Main Street Distributing, and read a traditional subjective scienter into section 857, we would afford greater latitude to defendants like Acty and we would make it more difficult for the

government to obtain convictions. Indeed, were it not so evident from the statute itself that section 857 contains an objective scienter component, we would construe section 857 in this way, and, thus, we would remand Poster and Acty's case for retrial under a differently stated standard. Cf. Liparota v. United States, 471 U.S. 419, 425 (1985) (so long as there is no "indication of contrary purpose in the language or legislative history of [a] statute," a court can read a **mens rea** into a statute).

We see nothing in the language of section 857 that would require a subjective scienter interpretation.[3] Section 857 does

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[3]In addition to the language of section 857 itself, we also considered its legislative history to see if this record contradicted our reading of the statute. The legislative history, however, consists of only one report of one committee hearing on an early version of the statute. From this meager record, and by relying on one

not contain any exclusive, subjective scienter language, nor does it contain any language which implies an exclusive, subjective scienter. Nowhere in the statute, for example, does it state that a person is only prohibited from "knowingly" selling drug paraphernalia or from selling items with the "intent" that they be used as drug paraphernalia.[4] Instead, section

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or two statements by one Representative, the district court in Main Street Distributing concluded that "there can be no doubt that Congress did intend to include a [subjective] scienter element in §857." Main Street Distributing, 700 F. Supp. at 664. We are unconvinced and have found that what little legislative history exists is either contradictory or of no help in interpreting the statute. See also Dyer, 750 F. Supp. 1288-89.

[4]In this respect, Congress appears to have deviated from the language of the Drug Enforcement Agency's Model Drug Paraphernalia Act of 1979, upon which section 857 is modeled. The Model Act states, in relevant part:

> It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Act.

Model Drug Paraphernalia Act, art. II, sec. B (1979) (emphasis added) (full text of Model Act is published in Appendix B of Main Street Distributing, 700 F. Supp. at 671-73). Congress's statute, quoted above, contains no such language in the statement of the offense in subsection 857(a).

857 simply states that it is unlawful to sell or deal in "drug paraphernalia," and it defines drug paraphernalia as "any equipment, product, or material of any kind which is primarily intended or designed for use" (emphasis added) with a controlled substance. We believe this "designed for use" language establishes unambiguously

that the offense contains an objective scienter. The "design" of an object refers to its objective features, and in the case of some drug paraphernalia, items as they are designed have no function other than to be used with illicit drugs As the district court explained in Dyer,

> [b]ecause these items may be identified by their physical characteristics and design features, there is no need for a demonstration of the defendant's subjective intent. Where the illicit purpose of the manufacturer or designer is embodied in the object itself, that purpose is apparent to all who perceive the object. "All that is required is for persons to open their eyes to the

> 'objective realities' of the items sold in their businesses."

Dyer, 750 F. Supp. at 1285 (quoting Garner v. White, 726 F.2d 1274, 1282 N.8 (8th Cir. 1984) (quoting The Casbah, Inc., v. Thone, 651 F.2d 551, 561 (8th Cir. 1981), cert. denied, 455 U.S. 1005 (1982)). An example of such an item is a "bong," which by design has no purpose (unless one imagines a highly contrived one, like "filling it with water and adding flowers") other than for use with illicit drugs. Id. at n.12. See also Village of Hoffman Estates v. Flipside, 455 U.S. 489, 501 (1982) ("designed for use" language in city's drug paraphernalia ordinance states an unambiguous standard that "encompasses at least an item that is principally used with illegal drugs by virtue of its objective features").

Our conclusion that section 857 and its "designed for use" language creates an objective scienter is strengthened by nearly all of the other provisions of the statute. Subsection (d), for example, lists items which Congress evidently determined are intended or designed for illegal purposes by their very nature and irrespective of a defendant's subjective intent. Dyer, 750 F. Supp. at 1286. Moreover, subsection (e) provides a list of factors to be considered in determining whether an item is drug paraphernalia, and all of these factors are objective in nature - that is, none of them ar dependent on the defendant's subjective state of mind. thus, subsection (e) states that among the "logically relevant factors" to be considered are "advertising concerning its use," "evidence of the ratio of sales of the item(s) to the total sales of the

business enterprise," and "expert testimony concerning its use." See Dyer, 750 F. Supp. at 1286. In addition, as the district court in Dyer, 750 F. Supp. at 1286. In addition, as the district court in Dyer also noted, the whole structure of section 857 supports an objective scienter reading: first the statute "provides a definition and enumerates examples of drug paraphernalia," then "it sets forth various objective factors to be assessed, followed finally by specific, objectively [-] based exclusions. The entire structure focuses on the items of drug paraphernalia, not on the purposes of the defendant." Id. at 1287.

Having concluded that section 857 contains an objective scienter element, we address Posters and Acty's claim that it is therefore unconstitutional as a "strict liability statute." If the conduct

prohibited by section 857 were a criminal offense under common law, like that which was at issue in Morissette, we would be required to either read a traditional subjective scienter into the statute or -- if such a construction was prohibited by the language or intent of Congress -- to hold it unconstitutional as a violation of due process. Morissette, 342 U.S. at 263. Section 857 does not concern conduct prohibited at common law, however, and, therefore, it is not unconstitutional simply on the basis that it does not contain a traditional subjective scienter requirement. The legislature has the prerogative with such statutory offenses to define the elements of the crime. See Liparota, 471 U.S. at 424 ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are

solely creatures of statute").

The Congress has passed statutes in the past which have severely modified or eliminated scienter, and we have upheld them against similar due process challenges. See e.g., Sipes v. United States, 321 F.2d 174, 179 (8th Cir. 1963) (26 U.S.C. § 5851, prohibiting the possession of certain firearms having barrels less than sixteen inches long, does not contain a scienter; "all the scienter which the statute requires" is that defendant knew he was in possession of a weapon). Perhaps the most analogous criminal statutes for purposes of this case are those involving obscenity. Consider, for example, the Supreme Court's decision in Hamling v. United States, 418 U.S. 87 (1974), where the Court held that the government is not constitutionally required

to prove that a defendant knew the materials he dealt with were obscene. but, instead, it was sufficient if the government proved that the defendant had "knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials." Id. at 123. Thus, although Section 857 does not grant a defendant the protection afforded by a subjective scienter, it is not unconstitutional simply by virtue of this omission.

2 **Vagueness**

Posters and Acty also claim Section 857 violates due process because it is unconstitutionally vague, both facially and as applied. We disagree.

A statute is unconstitutionally vague if persons "of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v.

Generally Construction Co, 269 U.S. 385, 391 (1926). Because we assume that a person "is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning." Grayned v. City of Rockford, 408 U.S. 105,1 08 (1972). Moreover, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law

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Posters and Acty's brief is less than clear on this point. Neither the exact nature nor basis for their claim is stated very well. In the heading of their opening brief, for example, they suggest that they only challenge Section 857 as it was applied to them. In the text of the brief, however, and in their reply brief, they suggest that the statute is vague on its fact. And at oral argument, Posters and Acty's attorney only claimed to make a

constitutional attack on the face of the statute. For certainty's sake, we will address all the arguments, at least so far as we can glean them from the briefs.

law impermissibly delegates basic policy matters to policemen, judge, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Id. at 108-09. Because of the nature of section 857, the vagueness standard that we apply is neither the most stringent nor the most tolerant of tests. Section 857 does not threaten "to inhibit the exercise of constitutionally protected rights," therefore it does not receive our most demanding scrutiny. Village of Hoffman Estates, 455 U.S. at 499. But it is also a criminal statute, and not merely an economic regulation, therefore we do not treat it with the greatest tolerance. Id.

Posters and Acty have the burden to demonstrate that section 857 is unconstitutionally vague, and to succeed in their facial sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." Such a [statute] simply has no core." Village of Hoffman Estates, 455 U.S. at 495 n.7 (citations omitted). Posters and Acty must "demonstrate that the law is impermissibly vague in all of its application." Id., at 497. Thus, "[i]f it is 'transparently clear' that some particular conduct is restricted by the [statute], the [statute] survives a facial challenge on vagueness grounds." Id. at 507-08 (White, J., concurring). Applying these principles, we cannot agree with Poster and Acty's claims.

Poster and Acty state that Section 857 is unconstitutionally vague on its face because it fails to adequately define or describe what constitutes drug paraphernalia -- that is, that it fails to give fair warning of what is prohibited. We believe, however, that Section 857 properly defines a "core" of prohibited conduct, as required by due process. Subsection (d) defines drug paraphernalia as those items "primarily intended or designed" for use with illegal drugs and it lists examples of items (such as "water pipes" and "bongs") which are prohibited; section (e) lists factors to be considered in determining whether an item is drug paraphernalia; and, subsection (f) exempts certain persons and items "traditionally intended for use with tobacco products": We agree with the district court in Dyer, that this "clear core of prohibited

conduct," "combined with the objective scienter standard, defeats a facial vagueness attack, as the 'interaction of definition and intent allays vagueness.'". Dyer, 750 F.Supp. at 1295 (quoting Levas and Levas v. Village of Antioch, 684 F.2d 446, 453 (7th Cir. 1982)). We also agree with Dyer, that the mitigating effect of scienter is not entirely lost simply "because the scienter requirement is objective in nature." Id, at 1296 (noting that "in Hoffman Estates, the Supreme Court explained that the phrase 'marked for use', was not impermissibly vague when taken in conjunction with the guidelines that referred to objective characteristics such as the manner of display and proximately to uncovered items").

With respect to the statute as applied, Posters and Acty's only point appears to be that the statute is

unconstitutional because law enforcement officers who executed the search warrants were able to "totally ignore" the factors listed in subsection (e) for determining what constitutes drug paraphernalia. Brief for Appellants at 10. Thus, according to Poster and Acty, "the listed characteristics only augment the statute's vagueness." Id. Posters and Acty seem to be arguing, in other words, that Section 857 is vague as applied because the government was able to completely disregard part of the statue and still obtain a conviction. WE simply disagree, however, that the factors in subsection (e) were ignored. The law enforcement officers, and more importantly, the government at trial, repeatedly referred to or used the factors listed (e.g., Posters and Acty's advertising material, expert testimony) to establish that the items being sold were

illegal. The actions of the government in this case are not evidence of the statute's vagueness.

B. **Sufficiency of Evidence**

Acty claims that on two counts -- money laundering and aiding and abetting the distribution of cocaine -- the evidence is insufficient to support her convictions. We consider claims of insufficiency of evidence under a deferential standard of review. Briefly, the evidence is viewed in teh light most favorable to the government; all reasonable inferences to support the verdict are given to the government; and the credibility of witnesses whose testimony supports the government is not judged. United States v. Williams, 897 F.2d 1430, 1432 (8th Cir. 1990). We consider Acty's claims with these principles in mind.

1. **Money Laundering**

First, Acty claims that the evidence is insufficient to support her conviction for laundering money, in violation of 18 U.S.C. Section 1956(a)(1)(B)(i).[5] To convict Acty of money laundering, the government had to prove that she knowingly

[5]Related to the money laundering count, Acty also argues that the district court erred by admitting the testimony of Donald Semesky, an expert witness who testified in support of the government's charge. Acty claims that the district court erred by permitting Semesky to testify that the check Acty deposited in her bank account "affected interstate commerce" under Section 1956(a)(1)(b), that the banks into which Acty deposited money were "financial institutions" under Section 1956(c)(4), and that Acty's financial activities constituted a "concealment" of money under Section 1956(a)(1)(B). Acty claims that by stating these "legal conclusions," Semesky prejudicially usurped the role of the judge and the jury. Rule 704(a) of the Federal Rules of Evidence, however, permits testimony in the form of an opinion that "embraces an ultimate issue to be decided by the trier of fact," and, after reviewing the record of Semesky's testimony, we disagree with Acty that Semesky's testimony did anything more than is permitted by the Rules.

conducted a financial transaction that involved the process of an unlawful activity and that she did so with the knowledge that the financial transaction was designed in whole or in part "to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds, of the unlawful activity. 18 U.S.C. Section 18956(a)(1)(B)(i). Acty claims that no evidence was presented to show that she concealed or disguised the proceeds from the Forbidden Fruit store. The evidence is by no means overwhelming, but we disagree that it is insufficient.

Acty knowingly sold both legal and illegal items in her Forbidden Fruit store for more than three years. According to the government, Acty deposited all of the money the store received -- the store was mainly a cash business, taking in thousand

of dollars each day -- into one bank account. Acty kept business records, but according to the government, it was impossible from these records to distinguish the amount received for the sale of legal items from the amount received for the sale of illegal items. Acty and Moore also deposited the receipts from the art gallery into this same account, and then, over the course of time, they withdrew money from this account to purchase automobiles, retirement plans, art work, and other items. By conducting the financial end of her drug paraphernalia business in this way -- commingling in one account, in an indistinguishable way, legitimate business receipts and illegitimate receipts -- a reasonable juror could infer that Acty's actions were designed to disguise the nature or the source of the proceeds from her unlawful

business. If we had sat on the jury, we might not have convicted Acty for money laundering. But in reviewing her conviction on appeal, we are unable to hold that the jury's conclusion was unreasonable.[6]

2. **Aiding and Abetting the Manufacture and Sale of Cocaine.**

Second, Acty claims that the evidence is insufficient to support her conviction for aiding and abetting Randy Kennedy in the distribution of cocaine, in violation of 21 U.S.C. Section 841(a)(1) and 18 U.S.C. Section 2. On this count, the

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[6]In support of her argument that the evidence was insufficient, Acty notes that in United States v. Sanders, 928 F.2d 940 (10th Cir.), , cert denied, 112 S.Ct. 142 (1991), the Tenth Circuit held that the appellant's actions in openly purchasing two automobiles in part with cash proceeds from drug activities did not constitute a violation of Section 1956(a)(1)(B)(i) because these were ordinary financial transactions with no evidence of a design to conceal or disguise the source or nature of the proceeds.

evidence is also sufficient. To be convicted of aiding an abetting, the government had to show at trial that Acty associated herself with the venture of manufacturing and selling cocaine, that Acty participated in the event as something she wished to bring about, and that Acty sought by her actions to make it succeed. United States v. McCrady, 774 F.2d 868, 874 (8th Cir. 1985). To phrase this in another way, the government had to show that Acty had a "purposeful attitude" or that some affirmative participation by Acty encouraged the perpetrator. Id.; United States v. Ivey, 915 F.2d 380, 384 (8th Cir. 1990). "Circumstantial evidence is 'intrinsically as probative as direct evidence' and may be the sole support for a conviction." McCrady, 774 F.2d at 874 (quoting United States v. Two Eagle, 633 F.2d 93, 97 (8th Cir. 1980)).

The circumstantial evidence against Acty was considerable. The government showed at trial that Forbidden Fruit sold, among other items, scale and substances commonly used by cocaine dealer to dilute cocaine (e.g. Mannitol, Inositol, and Lidocaine). The government also shoed that at least some of these substances have little or no lawful consumer use. The government, moreover, presented evidence of Acty's advertising, which suggested that she was selling the substances as diluents for cocaine. One product

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Acty's actions however, are distinguishable; not only were Acty's financial transaction in much larger amount and over a much longer period of time, but one could infer from her record keeping and bank deposits and withdrawals that Acty designed her operation to conceal or disguise her illegal proceeds.

called "PseudoCaine," was advertised by Acty as "The Hottest Active Cut In Nation! Its the new cut product everybody who bought Mannitol is now begging for! . . .'Burns' just like the real thing." Joint Appendix at Tab No. 12. In addition, the government presented the testimony of four conviction cocaine dealers, including Randy Kennedy., Each dealer testified that he had brought cocaine diluents from Acty in amounts that drug dealers rather than users would purchase.

We believe that this evidence (an all the reasonable inferences that can be drawn from it) is collectively more than sufficient to support Acty's conviction for aiding and abetting the manufacture and sale of cocaine.

C. Sentencing

In its cross appeal, the government argues that because the district court

found that Acty had aided and abetted the manufacture and distribution of 100 kilograms of cocaine, the district court erred by failing to impose the mandatory minimum prison sentence of ten years, as required by 21 U.S.C. § 841(b)(1)(A). The government also argues that the district court erred by departing from the guideline-specified sentencing range on the aiding and abetting count. (The guidelines range was 188 to 235 months in prison; Acty was sentenced to 108 concurrent months on all counts of conviction.,) We agree that the statute; minimum sentence should have been imposed, but because the government failed to make a timely objection we decline to remand for re-sentencing. We also disagree with the government that the district court erred by departing from the guideline-specified sentencing range.

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8 Curiously, Acty does not respond in her reply brief to the government's argument that she should have been sentenced according to the statute's mandatory minimum sentence. She only addresses the government's argument about the district court's departure from the guideline-specified sentencing range.

First we consider the government;s argument that Acty should be resentenced according to the mandatory 120 months in prison. The Government is correct that once the district court made a finding of fact that Acty had aided and abetted in the manufacture and distribution of 100 kilograms of cocaine, this finding, as a matter o flaw, brought Acty's offense within the purview of 21 U./S.C. § 841(b)(1)(A)(ii). Section 2(a) of Title 18 provides that "[w]hoever commits an offense against the United Stats or aids [or] abets . . . its commission, is punishable as a principal." "This provision is applicable

to the entire criminal code." United States vs. Rector, 538 F.2d 223, 225 (8th Cir. 1976), cert. denied, 441 U.S. 963 (1979); see also U.S.S.G. 2x2.1 (guidelines also provide that the offense level for aiding and abetting "is the dame level as that for the underlying offenses"). Thus Acty, who aided and abetted the manufacture and distribution of cocaine, is punishable under the provisions of 21 U.S.C. §841(b)(1)(A)(ii), which provides that any person whose conviction involved "5 kilograms or more" of cocaine "shall be sentenced to a term of imprisonment which may not be less than 10 years."

The government, however, failed to object to Acty's sentence when it was imposed by the district court. As a general rule, "[i]ssues not properly preserved at the district court level and presented for the first time on appeal

ordinarily will not be considered by this court as a basis for reversal unless there would be a plain error resulting in a miscarriage of justice." United States v. Meeks, 857 F.2d 1201, 1203 (8th Cir. 1988). Ut was plainly an error for the district court to sentence Acty below the statute's minimum, but Acty's sentence of 108 months (as opposed to the statute's required 120 months) does not result in a miscarriage of justice. See United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990) (no contemporaneous objection; sentence of fifty four months rather than the statute's required sixty months not a miscarriage of justice); see also United States v. Ragan, 952 F.2d 1049, 1049-50 (8th Cir. 1992) (no contemporaneous objection; downward departure from guideline-specified sentencing range not a miscarried of justice). The government,

moreover, received notice--by the presentence investigation report and ny the district court at the sentencing hearing -- that the amount of cocaine involved exceeded five kilograms, and the government had ample opportunity to object to the sentence after the district court notified it that the sentence might be as low as 108 months. See Transcript of Sentencing, col. IV at 471-75. Yet despite this notice and opportunity, the government failed to object.9

Next, we consider whether the district court erred in departing--on the aiding and abetting count--below the guideline specified sentencing range of 188 to 235 months. A district court is permitted to depart downward from the guideline-specified sentencing range if it finds a mitigating circumstance "of a kind, or to a degree, not adequately taken into

consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. 3553(b); see U.S.S.G. 5K2.0 In reviewing a district court's decision to depart, we must determine (1) whether, as a question or law, the circumstances relied on for departure are sufficiently unusual in kind of degree to warrant the departure, (2) whether, as a question of fact, the circumstances actually exist, and (3)

9The government argues that we should follow the First Circuit's decision in United States v. Rodriguez, 938 F.2d 319, 322 (1st Cir. 1991), where the court held that a sentence below a statute's minimum was subject to a plain error review, despite the failure of the government to make a contemporaneous objection, because the "imposition of a term of imprisonment less than the minimum mandated by Congress affects 'substantial rights'" under Fed. R. Crim. P. 52(b). Id. at 322. Rodriguez, of course, does not control our decision and Rodriguez is distinguishable from Acty's case. In Rodriguez, the Firs Circuit noted that the district court concluded the sentencing hearing without according to the government an opportunity to object. Id. at 321 n.3

whether or not the sentence is reasonable. United States v. Thomas 914 F.2d 139, 143 (8th Cir. 1990).

The government argues that the district court had no authority to depart because Acty was convicted of aiding and abetting and, as an aider and abettor, under the statutes and guidelines, she should be punished just as severely as a principal offender would be punished for the manufacture and distribution of 100 kilograms of cocaine., This reasoning may be fine in the abstract, but it does not take into account the circumstances of Acty's case. The district court, in summarizing its reasons for departing, stated the following:

> The Court finds that the Sentencing Commission, in determining the appropriate range for aiding and abetting sale and manufacture of controlled substances, did not

> have in mind nor adequately provide lower range for the type of circumstances involved here. This is essentially a drug paraphernalia and money laundering case, not a case of aiding and abetting a specific act of manufacturing or distributing controlled substances.

Acty's Judge at 5. We find no error with the district court's decision. As a matter of law, the circumstances of Acty's aiding and abetting conduct are sufficiently unusual in degree--if not in kind--to warrant a departure. Acty's only involvement in the manufacture and distribution in any other way. The district court also seemed to be of the opinion that Acty's sale of cocaine diluent was more in the nature of her business--that is, selling drug paraphernalia--and less in the nature of manufacturing and distributing cocaine. We are reluctant to disagree. Moreover, we believe that Acty's

prison sentence of 108 months for aiding an abetting is reasonable--if not more than reasonable--for her crime.

III. CONCLUSION

For the reasons stated, 21 U.S.C. § 857 is constitutional and Acty's conviction and sentences are affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 91-2426/2429SIDM

UNITED STATES OF AMERICA, :

Plaintiff-Appellee, :

vs. : ORDER DENYING PETITION FOR REHEARING AND SUGGESTION [OR REHEARING EN BANC]

POSTERS 'N' THINGS, LTD. etc., :

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

August 17, 1992

Order entered at the Direction of the Court:

Michael E. Gins

Clerk, U.S. Court of Appeals, Eight Circuit

APPENDIX B

UNITED STATES V. POSTERS 'N' THINGS, LTD. AND LANA CHRISTINE ACTY, No. 90-33 (S.D. Iowa 1990)

Section 21 U.S.C. Section 857(d)

(d) Definition of "drug paraphernalia"

The term "drug paraphernalia" means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under the Controlled Substances Act (title II of Public Law 91-513). [21 U.S.C.A. § 801 et seq.] It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, or amphetamines into the

APPENDIX C

human body, such as -

1. metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
2. water pipes;
3. carburetion tubes and devices;
4. smoking and carburetion masks;
5. roach clips: meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;
6. miniature spoons with level capacities of one-tenth cubic centimeter or less;
7. chamber pipes;
8. carburetor pipes;
9. electric pipes;

10. air-driven pipes;
11. chillums;
12. bongs;
13. ice pipes or chillers;
14. wired cigarette papers; or
15. cocaine freebase kits.

Section 841

A. Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

1. to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

2. to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

June 11, 1991

INSTRUCTION NO. 37

The term "drug paraphernalia" as defined in section 857(d) of Title 21, United States Code, means any equipment, product or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under the Controlled Substances Act. It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish,

hashish oil, PCP, or amphetamines into the human body.

The following fifteen sets of items constitute drug paraphernalia:

1. metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;
2. water pipes;
3. carburetion tubes and devices;
4. smoking and carburetion masks;
5. roach clips: meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;
6. miniature spoons with level capacities of one-tenth cubic centimeter or less;
7. chamber pipes;

8. carburetor pipes;
9. electric pipes;
10. air-driven pipes;
11. chillums;
12. bongs;
13. ice pipes or chillers;
14. wired cigarette papers; or
15. cocaine freebase kits.

Even if an item does not appear on this list, that item may still constitute drug paraphernalia for purposes of Section 857. In determining whether such an item constitutes drug paraphernalia, in addition to all other logically relevant factors, you may consider the following:

1. instructions, oral or written, provided with the item concerning its use;
2. descriptive materials accompanying the item of which explain or depict its use;

3. national and local advertising concerning its use;

4. the manner in which the item is displayed for sale;

5. whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

6. direct or circumstantial evidence of the ratio of sales of the items to the total sales of the business enterprise;

7. the existence and scope of legitimate uses of the item in the community; and

8. expert testimony concerning its use.

UNITED STATES V. POSTERS 'N' THINGS, LTD. AND LANA CHRISTINE ACTY, No. 90-33 (S.D. Iowa 1990)

June 11, 1991

INSTRUCTION NO. 39

The term "primarily intended", as used in these instructions, does not relate to the knowledge or intent of any particular person or persons. Rather, it is for you to determine the primarily intended use of any item by considering these instructions and all logically relevant factors.

APPENDIX F